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CITATIONS

620255—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 680

CORN PRODUCTS REFINING COMPANY AND CORN PRODUCTS SALES COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 527) is reported in 144 F. (2d) 211.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on September 18, 1944 (R. 596). The petition for writ of certiorari was filed on November 15, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

For reasons subsequently stated (*infra*, pp. 8–9), the Government does not oppose the granting of certiorari to review the questions presented by petitioners relating to the validity of paragraphs (1) and (2) of the Federal Trade Commission's order as modified by the court below (R. 597). Paragraph (1) of such order prohibits the petitioners from discriminating in price between different purchasers by selling glucose shipped from their Kansas City plant at delivered prices computed on petitioners' prices at their Chicago plant plus freight rate from Chicago to destination. Paragraph (2) prohibits discriminating in price between different purchasers of glucose by permitting favored customers, following a price increase, to book orders or to obtain delivery at petitioners' prior lower price for longer periods than allowed to petitioners' other customers.

The Government opposes the granting of certiorari to review the questions presented relating to the validity of paragraphs (3), (4), and (5) of the Commission's order (R. 489–490). These questions are:

(1) Whether the evidence and findings are sufficient to show that the effect of price discriminations given by petitioners to certain purchasers of gluten feed and meal and to certain purchasers of starch may be substantially to lessen competition or to injure, destroy or prevent competition

within the meaning of Section 2 (a) of the Clayton Act.

(2) Whether petitioners, in advertising candy of the Curtiss Candy Company of which dextrose purchased from petitioners constituted from 5% to 90% of the product, discriminated in favor of the purchaser of a commodity bought for resale after "processing", within the meaning of Section 2 (e) of the Clayton Act.

(3) Whether the evidence supports the Commission's determination that petitioners did not offer advertising service on proportionally equal terms to other candy manufacturers purchasing dextrose from petitioners.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) * * * it shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing

herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

* * * * *

(e) * * * it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

STATEMENT

The Federal Trade Commission brought this proceeding pursuant to Section 11 of the Clayton Act charging petitioners, a manufacturing concern and its wholly-owned marketing subsidiary, with violating Section 2 of that Act as amended by the Robinson-Patman Act of June 19, 1936.[1] The

[1] The Commission also charged petitioners with violating Section 3 of the Clayton Act (R. 13–14), but petitioners have not sought review of the decision below affirming that part of the Commission's order prohibiting the violation of Section 3 found by the Commission. See paragraph eleven of the Commission's findings and paragraph (6) of its order (R. 485–7, 490).

facts were largely stipulated (R. 186–200) but evidence was received on certain issues. Following the hearing the Commission filed its findings of fact and conclusion (R. 464–488) and entered a cease and desist order (R. 488–490). The court below, on a petition to review the order, affirmed it except for its prohibition of price differentials based upon the differing sizes of containers used by petitioners in making delivery (R. 527–541).[2] Judge Major dissented from the holding that petitioner's delivered prices on glucose shipped from their Kansas City plant violate Section 2 (a) of the Clayton Act, but otherwise concurred in the decision (R. 541–2).

Since the Government does not oppose the petition for certiorari in so far as it requests review of the validity of the provisions of the Commission's order directed against the price discriminations resulting from (1) petitioners' delivered prices on glucose shipped from their Kansas City plant and (2) petitioners' booking practices, the facts relating to these practices will not be set forth.

The facts concerning the price discriminations given by petitioners to certain purchasers of gluten meal and feed and to certain purchasers

[2] These price differentials are set forth in paragraph five of the Commission's findings and are prohibited by paragraph (1) of its order (R. 470–1, 489). The Court below modified paragraph (1) of the order to eliminate this prohibition (R. 597).

of starch were stipulated (R. 186–193) and the Commission's findings (R. 474–481) closely follow the stipulated facts. As to the former products the Commission found:

Petitioners sell gluten meal and feed, which are a by-product of their corn refining, to some 3,000 customers, and petitioners' output represents from 40% to 50% of the entire amount used in the United States. Petitioners have given to six concerns a discount of 50¢ a ton from the regular market prices which they have charged to other customers, including those located in the respective areas in which the six favored concerns resell gluten feed and meal. Petitioners offered no evidence to show that the discounts made only due allowance for differences in cost to petitioners resulting from the differing methods or quantities, if any, in which such products were sold to the favored companies. The discounts are sufficient, "if and when reflected in whole or in substantial part in resale prices," to attract business away from competitors of the favored concerns, or to "force" these competitors to resell at a substantially reduced profit, "or to refrain from reselling." (R. 474–480.)

The Commission found that petitioners sold corn starch to two companies at a "substantial discount" from the list prices at which petitioners concurrently sold to competitors of these companies. The findings as to the competitive effect of the dis-

counts are substantially the same as those made with reference to gluten feed and meal. It was likewise found that no evidence has been offered that the discounts made only due allowance for differences in cost resulting from differing methods or quantities involved in the sales made to the two favored companies. (R. 480–1.)

The facts relating to the Curtiss Candy Company were developed by testimony and exhibits. This company spends as much for advertising as all other candy companies in the United States combined. In 1936 it agreed with petitioners to use dextrose, which is a dry, powdered product derived from glucose, for the manufacture of most of its candies and to advertise the use of dextrose in its candies. The Curtiss Company used the dextrose purchased from petitioners in making candy by mixing it with such other ingredients as milk, butter, eggs, chocolate, and peanuts, but dextrose constituted a substantial, and frequently a major, portion of the candies sold by the Curtiss Company. Petitioners, for their part, began advertising Curtiss candies as being rich in dextrose, and during the years 1936 to 1939, inclusive, spent approximately $750,000 in advertising Curtiss candies. During this period the Curtiss Company's purchases of dextrose from petitioners increased from about 1,350,000 pounds in 1936 to over 7,000,000 pounds in 1939, and the company, which had not purchased any glucose from peti-

tioners in 1936 and 1937, bought from them in 1938 over 10%, and in 1939 nearly 60%, of its glucose requirements. Petitioners during the time that they were advertising Curtiss candy sold dextrose to candy manufacturers competitive with the Curtiss Company but did not furnish advertising service to any of these competitors and since June 19, 1936, petitioners have instructed their salesmen to advise their confectionery customers that petitioners do not contribute to the advertising done by customers. (R. 481–5.)

ARGUMENT

I

The Government believes that the court below was correct in holding that Section 2 (a) of the Clayton Act prohibits price discriminations resulting from selling a product at delivered prices computed on a fictitious basing point. But since the application of the statute to price discriminations of this kind presents a question of federal law of general importance which has not been passed upon by this Court and since this question will be in issue in *Federal Trade Commission* v. *Staley Manufacturing Company,* No. 559 this Term, certiorari granted November 20, 1944, the Government does not oppose review of the questions presented in the petition (pp. 18–19) relating to this issue.

The Government also does not oppose review of the questions raised by the petition as to the

validity of paragraph (2) of the Commission's order, which prohibits price discriminations granted in connection with petitioners' booking practices. The court below in sustaining this part of the Commission's order held that general testimony that these price discriminations were granted because competitors were giving like discriminations, without any testimony as to specific instances and facts, was insufficient to establish that petitioners' discriminatory prices were made in good faith to meet the equally low price of a competitor, within the proviso of Section 2 (b) of the Clayton Act (R. 534). This holding presents a question closely analogous to one which this Court has consented to review in the *Staley* case, namely, whether acceptance by a seller, without inquiry into the facts, of verbal statements of buyers concerning the action of competitors establishes justification within the proviso of Section 2 (b).

II

As to the price discriminations which resulted from the discounts granted by petitioners to certain purchasers of gluten feed and meal and of starch, the question presented by the petition (see pp. 13, 22) is whether the evidence and findings support the conclusion that the effect of the discriminations "may be substantially to lessen competition * * * or to injure, destroy, or prevent competition." We submit that such effect

is clearly shown by the evidence and findings (*supra*, p. 6) that the discounts, if and when reflected in the favored customers' resale prices, are sufficient to attract business away from their competitors or to force these competitors to resell at a substantially reduced profit or to refrain from reselling. The court below said that the natural result of these facts "is even more than 'reasonably probable' to produce the prohibited injurious effect upon competition" (R. 535).

The Commission found that petitioners, at the same time that they were giving certain customers a discount, were selling in "substantial quantities" at their regular market prices to their many other customers in the area in which each favored customer resold (R. 476–9, 480). This establishes that the competition between the favored and non-favored customers was substantial, and the cases which petitioners cite (Br. 32–33) for the proposition that "competition cannot be substantially lessened unless substantial competition exists" are therefore not in point. The cases are further not in point because the prohibitions of Section 2 (a), unlike those of Sections 3 and 7, apply not only where the effect may be substantially to lessen competition but also where the effect may be "to injure, destroy, or prevent competition".

We submit that the question whether the court below correctly appraised the particular evidence and findings does not present a question of stat-

utory interpretation of general application and therefore does not merit review by this Court.

III

Section 2 (e) of the Clayton Act makes it unlawful to furnish to the purchaser of a commodity bought for resale, "with or without processing," any services connected with resale of the commodity not accorded to all purchasers on proportionally equal terms. Petitioners contend that a commodity is not within this prohibition if it is bought for resale after processing operations which destroy its separate identity and that the advertising services which it furnished the Curtiss Candy Company are therefore not within Section 2 (e). No reason for giving the section this limited meaning is suggested and no supporting authority is referred to.

The court below concluded that Congress used the words "with or without processing" as a comprehensive term to embrace all goods bought for resale whether in their original form or after processing operations (R. 538). This interpretation accords with both the language of the statute[3]

[3] In *Cochrane* v. *Deener*, 94 U. S. 780, 788, this Court said that a "process" is "an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." This definition has been applied to the word "processing" used in connection with manufacturing operations. *Bedford* v. *Colorado Fuel & Iron Corp.*, 102 Colo. 538, 541, 549.

and its manifest purpose. The distinction drawn is between goods bought for the purchaser's own use, such as plant equipment, and goods bought for resale whether with or without processing. This is a natural distinction to draw since Section 2 prohibits various kinds of preferences to purchasers which give or might give them an advantage in competition over other customers of the same seller. Such effect is likely to arise where a commodity is resold but not if it is retained by the purchaser for his own use. We submit that the decision below is plainly right and, in the absence of any contrary ruling, is not sufficiently doubtful to warrant review by this Court.

The other questions raised by the petition with reference to the advertising services furnished the Curtiss Candy Company do not seem to require serious consideration. The fact that the Curtiss Company did not expressly agree to purchase its dextrose from petitioners does not make it any the less a "purchaser" within the meaning of Section 2 (e). The contention that the requirement that services furnished to one purchaser be accorded to all purchasers "on proportionally equal terms" is to be read as if it meant "all purchasers whose volume of business substantially equals that of the favored purchaser" is simply a plea that the word "proportionally" be read out of the statute.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied except as to the questions presented respecting the validity of paragraphs (1) and (2) of the Commission's order.

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